United States Court of Appeals for the Second Circuit



BRIEF FOR APPELLEE

76-6015

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARK JACOBSON and RANGER BAKERS, INC.,

Plaintiffs-Appellants

v.

THE ORGANIZED CRIME AND RACKETEERING
SECTION OF THE UNITED STATES DEPARTMENT OF
JUSTICE, THE INTERNAL REVENUE SERVICE OF THE COURT OF A
UNITED STATES, MARTIN SENZER, Revenue Officer ED
DOMINICK PALLILA, Group Manager, RAYMOND
KEENAN, Chief, Collection Division, and
CHARLES BRENNAN, District Director,

Defendants-Appellees SECOND CIRCUIT

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE INTERNAL REVENUE SERVICE AND ITS OFFICIALS

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IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 76-6015

MARK JACOBSON and RANGER BAKERS, INC.,
Plaintiffs-Appellants

v.

THE ORGANIZED CRIME AND RACKETEERING SECTION OF THE UNITED STATES DEPARTMENT OF JUSTICE, THE INTERNAL REVENUE SERVICE OF THE UNITED STATES, MARTIN SENZER, Revenue Officer, DOMINICK PALLILA, Group Manager, RAYMOND KEENAN, Chief, Collection Division, and CHARLES BRENNAN, District Director,

Defendants-Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE INTERNAL REVENUE SERVICE AND ITS OFFICIALS

STATEMENT OF THE ISSUES PRESENTED

In general terms, the question presented is whether the District Court correctly dismissed the plaintiffs' complaint seeking both injunctive relief and damages against the defendants. More particularly, the issues are:

1. Whether the plaintiffs' request for injunctive relief was barred by the Anti-Injunction Act, Section 7421(a) of the Internal Revenue Code of 1954;

2. Whether the plaintiffs' complaint, insofar as it sought damages for alleged violations of their Constitutional rights, was properly dismissed on jurisdictional grounds against the Internal Revenue Service, and for failure to state a claim upon which relief could be granted against the named Internal Revenue officials.

STATEMENT OF THE CASE

This is an appeal from the judgment entered pursuant to the memorandum and order of the United States District Court for the Eastern District of New York (Honorable Edward R. Neaher) dismissing the plaintiffs' complaint and directing that judgment be entered in favor of the defendants, Internal Revenue Service, Martin Senzer, Dominick Pallila, Raymond Keenan and Charles Brennan. (R. 79a-94a.) The memorandum and order was filed on November 12, 1975, and is reported at 403 F. Supp. 1332. Judgment was entered in accordance with the District Court's order on November 14, 1975. (R. la.) The plaintiffs filed a notice of appeal on January 14, 1976, which the District Court, upon plaintiffs' motion, deemed timely filed pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure. (R. la.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

^{1/ &}quot;R." references are to the separately bound record appendix.
"Tr." references are to the Transcript of Proceedings in the District Court.

The facts of this case, as developed by the documents $\frac{2}{}$ comprising the record on appeal, may be summarized as follows:

Mark Jacobson is the president of Ranger Bakers, Inc. (Ranger), which was engaged in the baking business on a large scale in the New York City area (one of its customers was the public school system for New York City). (R. 2a.) On October 29, 1974, Ranger acquired some of the assets of Silvercup Bakeries, Inc. (Silvercup), then in proceedings under Chapter XI of the Bankruptcy Act (11 U.S.C., § 701 et seq.). (R. 5a, 24a, 81a.) Ranger assumed liability for a portion of Silvercup's delinquent withholding tax payments as part of the purchase. (R. 42a-43a.) Under Jacobson's direction, Ranger continued Silvercup's business operation which, according to Jacobson, began to improve by the spring of 1975. (R. 25a.) In May, 1975, a newspaper in New York City published an article alleging that Jacobson operated the business as a front for Sam Jacobson (his father) who was described in the article as being involved in the gambling underworld. (R. 44a-46a, 81a.) This information was purportedly "leaked" to the newspaper by the Organized Crime and Racketeering Section of the United States Department of Justice (Strike Force) which was investigating possible criminal violations concerning Ranger,

^{2/} Since the District Court dismissed the plaintiffs' complaint, the well-pleaded facts in the complaint are taken as true for purposes of this appeal.

Silvercup and others. (R. 26a, 3la, 65a.) As a result of this adverse publicity, the plaintiffs claim that Ranger's business deteriorated through the loss of customers, suppliers and financial backing. (R. 3la, 82a.) Accordingly, Ranger's revenues decreased to the extent that it was unable to make all of its weekly employment tax deposits for the second quarter of 1975 (Secs. 3102 and 3402 of the Internal Revenue Code of 1954; Treasury Regulations on Employment Tax (1954 Code), \$31.6302(c)-1), falling delinquent in paying over such taxes in the sum of approximately \$264,000. (R. 3la, 82a.)

The plaintiffs received a notice on September 30, 1975, from the Internal Revenue Service that withholding taxes for the second quarter of 1975 were owing, in the amount of \$264,492.86, and that the balance was payable by October 9, 1975. (R. 32a, 51a.) That same day, Jacobson met with Internal Revenue Service officials including defendants Martin Senzer, a revenue officer, and Dominick Pallila, a group manager. (R. 32a.) At this meeting, Jacobson explained that Ranger would have great difficulty in meeting this liability, and offered to

^{3/} In his affidavit submitted below, Jacobson asserts that the Strike Force has consistently used its investigative powers to harass him and his father, citing a request in 1973 for records of two corporations with which they were associated, the issuance of a Federal Grand Jury subpoena in May, 1975, requesting production of Ranger's books and records, and the issuance of another subpoena to Ranger's insurance broker requesting his records regarding Ranger and one of its principal customers. (R. 27a-28a.)

make payments of \$10,000 per week in that regard. (R. 32a.) The officials who were present gave no assurance that such a proposal would be agreeable to their superiors, and a second meeting with Jacobson was scheduled for 1:00 p.m. on October 1, 1975. (R. 32a.) That day, Jacobson changed the time of the meeting to 2:00 p.m., but in the interim a jeopardy assessment (under Section 6862 of the Internal Revenue Code of 1954) was made against Ranger, which permitted the Internal Revenue Service to collect the delinquent withholding taxes through immediate levy on Ranger's property. (Section 6331(a) of the Code.) (R. 32a-33a, 82a.) Levies were placed on Ranger's payroll account and on several customers. (R. 33a, 82a.) Later that day, Jacobson met with defendant Raymond Keenan, Chief of the Collection Division, who informed Jacobson that his offer of installment payments was not acceptable to the Internal Revenue Service. (R. 33a-34a.) Jacobson was not permitted a meeting with Charles Brennan, the District Director. (R. 34a-35a.) Although Jacobson had previously represented that Ranger could not meet its obligations, on October 2, 1975, it made a payment of \$280,715.62 to satisfy

A/ Ranger ceased business operations on November 15, 1975, and the final settlement of its affairs, including payment of its creditors, has been beset by considerable turmoil. (Order to Show Cause on Pltf's Motion under Rule 4(a) F.R.A.P., Affidavit of Counsel, par. 6.)

the jeopardy assessment. (R. 52a.) The levies made pursuant to the assessment were released immediately. (R. 53a-60a.)

Having thus resolved Ranger's withholding tax liability for the second quarter of 1975, it was also determined that Ranger was also delinquent in payment of such liability for the third quarter (ending September 30). Without Ranger's payroll records for that period, the Internal Revenue Service estimated Ranger's liability for the third quarter as the same as the liability shown on its withholding tax return for the second quarter, \$394,844.37. (R. 51a.) Defendant Senzer demanded payment of the taxes due for the third quarter on October 9, 1975 (R. 37a), and on October 14, a jeopardy assessment was made with respect to these taxes, immediate payment was demanded and further levies were placed on Ranger's property (R. 82a-83a). Ranger apparently satisfied this assessment, and the levies were released. (Tr. 29.)

^{5/} Although Ranger's withholding tax delinquency for the second quarter was \$267,809.13, the jeopardy assessment included a five percent penalty permitted under Section 6656 of the Code for underpayments of deposits required under Section 6302 of the Code and the Regulations thereunder.

^{6/} Part of the payment of the assessment was made on checks issued by Automated Bread Distributors Corp., a company in which Jacobson was a shareholder and an officer. On October 7, 1975, that corporation was informed that its tax return for its fiscal year ending September 30, 1974, would be examined by the Internal Revenue Service. (R. 37a, 61a.)

On October 15, 1975, the plaintiffs instituted this action in the District Court. (R. la.) The plaintiffs named as defendants the Strike Force and the Internal Revenue Service in addition to the individual officials of the Internal Revenue Service. (R. 2a-5a.) In their complaint, the plaintiffs generally alleged that the Strike Force engaged in its criminal investigation solely to harass the plaintiffs, thereby ruining Ranger's business and Jacobson's future in the business world. (R. 5a-9a.) The plaintiffs repeated these allegations as to the Internal Revenue Service and its named officials, further citing a conspiracy between the Strike Force and the Internal Revenue Service to harass them. (R. 9a-13a.) Based on these alleged violations of their Fifth Amendment rights to Due Process the plaintiffs sought to enjoin the Strike Force from continuing its investigation until an indictment was returned, to enjoin the Internal Revenue Service from denying them evenhanded treatment in the enforcement of the tax laws by refusing to permit an installment payment plan for its delinquent withholding tax liabilities and to enjoin all of the defendants from conspiring to deny Jacobson his civil rights. (R. 17a-18a.) Jacobson further sought damages of \$1,500,000 from all of the defendants for violations of his civil rights under 42 U.S.C. § 1981, and for conspiracy to violate his rights under 42 U.S.C. § 1985. (R. 14a-15a.) Punitive damages of \$3,000,000 were also sought. (R. 15a-16a.)

On October 22, 1975, an order to show cause was entered in the District Court, and on October 24, 1975, a hearing was conducted on the plaintiffs' request for a preliminary injunction and on the Government's motion to quash the subpoenas which the plaintiffs had caused to be issued. (R. la.) The District Court quashed the subpoenas (Tr. 16) and, on November 12, 1975, entered its memorandum and order in which it ruled that the plaintiffs' request for injunctive relief against the Internal Revenue Service and its named officials was barred by Section 7421 of the Code (R. 79a-93a). In its order, the District Court also made the appropriate determinations under Rule 54(b) of the Federal Rules of Civil Procedure that, there being no just reason for delay, judgment should be entered in favor of the Internal Revenue Service and its named officials, dismissing the complaint as to them. Judgment was entered pursuant to this direction, and this appeal followed.

^{7/} The District Court ordered the complaint dismissed as to the Strike Force in a memorandum and order filed on April 12, 1976, and judgment for the Strike Force was entered the following day. There has apparently been no appeal from that judgment, and the Strike Force is not involved in these proceedings in any way.

SUMMARY OF ARGUMENT

1. The District Court correctly ruled that it did not have jurisdiction of the plaintiffs' request for injunctive relief against the Internal Revenue Service and its named officials, in that such relief is barred by the Anti-Injunction Act, Section 7421(a) of the Internal Revenue Code of 1954. This provision is geared to protect the Government's compelling need to assess and collect taxes as expeditiously as possible, with a minimum of pre-collection judicial interference. Unquestionably, the equitable relief sought by the plaintiffs herein, insofar as they seek to undo the proper assessment and collection of Ranger's withholding taxes, and to force the Internal Revenue Service to accept installment payments of that undisputed liability, would controvert the literal terms of Section 7421(a), and would thus be squarely prohibited.

The thrust of the plaintiffs' request for injunctive relief, however, is that the defendants' collection activities and refusal to permit installment payments constitute harassment, and should therefore be subject to equitable relief apart from the Anti-Injunction Act. But the Supreme Court, in Bob Jones University v. Simon, 416 U.S. 725, 740 (1974), put to rest the notion that allegations of bad faith enforcement of the tax laws suffice to remove the bar of Section 7421(a), unless it is shown that the actions taken on behalf of the Service are completely without independent basis in the requirements of the Code. No such showing can be or has been made in this case.

The taxes assessed in this case are employment taxes required to be withheld by Ranger from its employees' wages. Once withheld, these taxes constitute a special fund in trust for the United States. Ranger was required to pay over these withheld taxes on a weekly basis. Although Ranger filed its withholding tax return for the second quarter of 1975 showing a liability of about \$395,000, by October, 1975, Ranger had defaulted in its weekly payments for the second and third quarters by amounts in excess of \$550,000. The taxes for the second quarter were assessed according to Ranger's return for that period, and demand for payment within 10 days was made. After Jacobson represented that Ranger could not readily meet its substantial liability, a jeopardy determination was made under Section 6862(a), permitting collection activities to commence prior to the end of the 10-day period. Although the plaintiffs assert that no demand for immediate payment was made pursuant to this jeopardy determination, this allegation, even if true, would reflect nothing more than a possible technical defect in the levies placed after the jeopardy determination. It would in no way detract from the fact that the taxes, which were admittedly due, had been properly assessed and that payment of the delinquency was due by October 9. The plaintiffs do not contend that there are even technical defects in the jeopardy assessment made for the third quarter. Both assessments

were satisfied from independent sources. The power to make jeopardy determinations is, of course, exclusively placed in the discretion of the District Director, as is the decision to permit installment payments of tax liabilities. Accordingly, it is obvious that the defendants' actions in this case, even assuming that there might have been certain technical errors, are not completely without an independent basis in the revenue-collecting requirements of the Code under the teaching of Bob Jones University, and that the Anti-Injunction Act should bar the injunctive relief sought, unless a statutory or judicial exception to Section 7421(a) can be established.

The statutory exceptions to Section 7421(a), as here pertinent, are found in Sections 6212 and 6213 of the Code, which prescribe the rules governing notices of deficiency covering income and estate and gift taxes. Since this case involves employment taxes, these exceptions are inapplicable here. Accordingly, the plaintiffs' reliance on Laing v. United States, 44 U.S. Law Week 4035 (Sup. Ct., Jan. 13, 1976), is misplaced. The facts in Laing clearly demonstrate that the Court was there dealing with the Section 6213(a) exception to Section 7421(a). Any possible technical defects in the second quarter levies in this case simply would not trigger a statutory exception to the Anti-Injunction Act.

The plaintiffs likewise fail to fit within the extremely narrow judicial exception to Section 7421(a) fashioned by the Supreme Court in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1

(1962): (1) under no circumstances can the Government ultimately prevail on its claims, and (2) equity jurisdiction otherwise exists. Since the plaintiffs do not contest the withholding tax liability which forms the basis for the assessments in this case, they fail to satisfy the first portion of the Williams Packing test. Both parts of the test must be met before the exception can be invoked and, having failed on the initial premise, the plaintiffs cannot evade the grasp of the Anti-Injunction Act. (It is equally clear, in any event, that the plaintiffs cannot successfully claim that the collection of the instant taxes subjected them to irreparable injury for which there was no adequate remedy at law, so as to demonstrate the existence of equity jurisdiction, since they are afforded the means for a judicial determination of Ranger's tax liability by way of a suit for refund of the taxes paid.)

Viewed in light of the instant case, the Supreme Court's recent decision in Commissioner v. Shapiro, 44 U.S. Law Week 4313 (Sup. Ct., Mar. 8, 1976), serves only to demonstrate the narrow scope of the Williams Packing exception to Section 7421(a). In Shapiro, the Court ruled that, where the facts of the case showed that later access to a judicial forum was completely denied a taxpayer, the Commissioner must make an initial showing that the assessment on which collection was made had a "basis in fact." Here, the plaintiffs at all times had (and still have) access to the District Court for a refund suit. Moreover, there is no question

that the instant assessments had a "basis in fact," since the liability was uncontested and the Government's prospects for collection were uncertain at best.

The plaintiffs' assertion that Section 6862(a) is unconstitutionally vague is likewise without merit. It is well established that the Constitutional nature of the taxpayer's claim, as distinct from its probability of success, is of no Consequence under the Anti-Injunction Act. The plaintiffs' constitutional challenge hardly presents a strong enough legal argument to permit the application of the Williams Packing exception to the case at bar. The vagueness doctrine generally requires that the statutory language contain a sufficient warning as to the proscribed conduct, as measured by common understanding and practices, which triggers the statutory sanction. Of course, the doctrine permits sufficient breadth in statutory language to give effect to the purpose of the statute i a myriad of factual situations. Section 6862(a) (and the Regulation thereunder) permits a departure from normal collection procedures where the District Director "believes" that the collection of the tax will be jeopardized by delay. In light of the obvious importance of summary collection procedures to the Government, and the variety of the circumstances which necessitate the use of such procedures, it cannot be said that the language of Section 6862(a) is unduly vague. Indeed it would clearly be within a businessman's common understanding and practice that the Internal Revenue Service may seek summary collection of a withholding tax delinquency in excess of \$500,000 where the employer's

officers have directed payment of other creditors from such trust funds, and where the officers represented, after an initial demand for payment, that the business is failing and that ready payment cannot be made.

The plaintiffs must also fail in their attempt to limit the situations in which a District Director may make a jeopardy determination under Section 6862 by invoking the language of Section 6851, dealing with jeopardy terminations of the taxable year. Section 6851 in no way limits Section 6862, since, taken as a whole, the language of Section 6851(a) is at least as broad as Section 6862(a). In any event, the legislative history to Section 6862(a) shows that this provision, as originally enacted, contained similar language to the present Section 6851(a), but was amended to read in its present form only two years later. This is unequivocal evidence of the Congressional intent behind Section 6862(a), and further substantiates that statute's Constitutionality.

2. In dismissing the plaintiffs' request for injunctive relief, the District Court also properly dismissed the plaintiffs' actions for damages against the instant defendants <u>sua sponte</u>. Having scught no relief from this judgment in the District Court, the plaintiffs now argue, in effect, that they stated several causes of action for damages against the defendants. No cause of action exists against the Internal Revenue Service, however, since that agency is not a suable entity and is protected by the doctrine of sovereign immunity.

Moreover, it is readily apparent that the plaintiffs' complaint failed to state a cause of action against the individual defendants. Plaintiff Jacobson's allegation that the defendants conspired to violate his civil rights, relying on 42 U.S.C. § 1985(3), is unsupported by the further allegation that any alleged discrimination was class based, as is required under that statute. See Griffin v. Breckinridge, 403 U.S. 88, 102 (1971). The plaintiffs also seek to impose tort liability on the defendants, but fail to allege any acts undertaken by the defendants which were beyond the outer perimeter of their line of duty. The defendants should thus be accorded the absolute immunity from tort suits traditionally applicable to Internal Revenue officials engaged in collection actions. Barr v. Matteo, 360 U.S. 564 (1959); Berberian v. Gibney, 75-1 U.S.T.C., par. 9452 (C.A. 1, 1975); David v. Cohen, 407 F. 2d 1268 (C.A. D.C., 1969).

Finally, the plaintiffs would seek to amend their complaint to include a prayer for damages based on alleged violations of their Fifth Amendment rights. While federal officials are generally now accorded only a qualified, good-faith immunity from civil suits based on claims of unconstitutional conduct, the plaintiffs, by failing to allege in other than a conclusory fashion acts which in themselves are violative of Constitutional rights, simply have not stated such a claim. The acts allegedly undertaken below were aimed at the collection of a substantial

tax liability which was admittedly overdue, and the collection of which was very uncertain. In addition, the statutory requirements of the Code were adhered to in the course of these collection activities, save possible procedural defects which do not take on Constitutional dimensions. Also, the plaintiffs suffered no violation of their Fifth Amendment rights by the jeopardy determinations in this case, notwithstanding the fact that Revenue officials may choose another course of action under other undefined circumstances. Ranger's obligation to pay over the taxes withheld from its employees arose independently of any criminal investigation by the Strike Force, and its failure to make the payment of these taxes invited the collection actions taken in this case. Thus, the plaintiffs' allegations of conspiracy between the Internal Revenue Service and the Strike Force must necessarily fall of their own weight.

The judgment of the District Court is correct and should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE PLAINTIFFS' COMPLAINT AND ENTERED JUDGMENT FOR THE DEFENDANT INTERNAL REVENUE SERVICE AND ITS NAMED OFFICIALS

A. The plaintiffs' request for injunctive relief is barred by the Anti-Injunction Act

The District Court correctly ruled that it did not have jurisdiction of the plaintiffs' request for injunctive relief against the Internal Revenue Service and its named officials in that such relief is barred by the Anti-Injunction Act, Section 7421(a) of the Internal Revenue Code of 1954, which provides, in pertinent part:

Except as provided in Sections 6212(a) and (c), [and] 6213(a) * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

In <u>Enochs</u> v. <u>Williams Packing Co.</u>, 370 U.S. 1 (1962), the Supreme Court stated that the principal purpose of this jurisdictional provision is to protect the Government's compelling need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference. The Court likewise recognized that a "collateral objective" of the Act is to protect the collector from litigation pending a suit for refund. 370 U.S., pp. 7-8; see also <u>Bob Jones University v. Simon</u>, 416 U.S. 725, 736 (1974).

^{8/} Hereinafter "defendants" shall refer to the Internal Revenue Service and the named Internal Revenue Service officials, and not to the Strike Force. See fn. 7, supra.

The Court has more recently reaffirmed the doctrine enunciated in Williams Packing in Bob Jones University v. Simon, supra, where the Court reasoned that the narrow judicial exception to the Anti-Injunction Act outlined in Williams Packing (and discussed, infra) served to give the Act an "almost literal effect." 416 U.S. p. 737. Unquestionably, the equitable relief sought by the plaintiffs herein, insofar as they seek to undo the proper assessment and collection of Ranger's withholding taxes and force the Internal Revenue Service to accept installment payments of that undisputed liability, would invoke the literal terms of Section 7421(a) and would thus be squarely prohibited.

The thrust of the plaintiffs' request for injunctive relief, however, is that the defendants' activities in collecting the withholding taxes due, and in refusing to permit installment payments of that liability, constitute harassment, and should therefore be subject to equitable relief apart from the Anti-Injunction Act. But, in the context of this case, this contention by the plaintiffs is without merit.

In <u>Bob Jones University</u>, the plaintiff, a private university, sought to enjoin the revocation of its tax-exempt status, and in support of its complaint alleged that the policy of the Internal Revenue Service there in question was not to protect revenue, but rather to regulate the admissions policies (specifically with respect to race) of private universities.

The plaintiff university, accordingly, argued that the Anti-Injunction Act should be inapplicable. In dismissing this contention, the Court stated, 416 U.S., p. 740:

There is no evidence that * * * [the Internal Revenue Service's actions do not] represent a good-faith effort to enforce the technical requirements of the tax laws, and, without indicating a view as to whether the Service's * * * [actions are] correct, we cannot say that its position has no legal basis or is unrelated to the protection of the revenues. The Act is therefore applicable. Petitioner's attribution of non-tax-related motives to the Service ignores the fact that petitioner has not shown that the Service's action is without independent basis in the requirements of the Code.

The Court has thus laid to rest the notion that allegations of bad faith enforcement of the tax laws suffice to remove the bar of the Anti-Injunction Act unless it is shown that the actions taken on behalf of the Service are completely without independent basis in the requirements of the Code.

See Black v. United States, 76-1 U.S.T.C., par. 9383 (C.A. 2, April 23, 1976); Lewis v. Sandler, 498 F. 2d 395 (C.A. 4, 1974). It is clear that the defendants' actions in the instant case were founded firmly in the revenue-protecting requirements of the Code and that the Anti-Injunction Act should, accordingly, bar the injunctive relief sought by the plaintiffs.

^{9/} To the extent that they conflict with this proposition, the contrary decisions rendered prior to Bob Jones University are obviously of questionable validity. See, e.g., Sherman v.

Nash, 488 F. 2d 1081 (C.A. 3, 1973); United States v. Bonaguro, 294 F. Supp. 750 (E.D. N.Y., 1968), aff'd on other grounds sub nom. United States v. Dono, 428 F. 2d 204 (C.A. 2, 1970), cert. denied sub nom. Bonaguro v. United States, 400 U.S. 829 (1970).

The taxes assessed in this case are income and social security taxes required to be withheld by Ranger from its employees' wages under Sections 3101 (26 U.S.C.), 3102 and 3402 of the Code, Appendix, infra. Once withheld, these taxes constitute a special fund in trust for the United States under Section 7501, Appendix, infra. In addition, payment of these taxes is subject to a specific exception to the general rule that payment of taxes must be made when the return is filed. Sec. 6151 of the Code (26 U.S.C.). Whereas Ranger was required to file only quarterly withholding tax returns (before the last day of the first calendar month following the close of the period), it was specifically required to pay over the withheld taxes to the United States by way of deposits at specified banks on a weekly basis. Sec. 3501 of the Code; Treasury Regulations on Employment Tax (1954 Code), §§ 31.6011(a)-4, 31.6071(a)-1 and 31.6302(c)-1, Appendix, infra.

^{10/} The requirement for weekly payment by the employer of withheld taxes represents an obvious legislative intent to insure that the Government obtains the revenue justly due it. It is clear that such withheld taxes can be easily appropriated to other needs of a business particularly where, as here, the employer's business is experiencing severe setbacks. Indeed, this is precisely what happened regarding Ranger's withholding taxes. (R. 31a.) See, e.g., Mueller v. Nixon, 470 F. 2d 1348, 1351 (C.A. 6, 1972), cert. denied, 412 U.S. 949 (1973).

It is uncontested in the instant case that, although Ranger filed its withholding tax return for the second quarter of 1975 showing a liability of approximately \$395,000, Ranger defaulted in its weekly deposits during the second and third quarters of 1975 by amounts in excess of \$550,000 (\$264,000 for the second quarter and in excess of \$300,000 for the third quarter). (R. 51a; Tr. 29.) In seeking to collect the delinquency for the second quarter, the Internal Revenue Service assessed the delinquency shown on Ranger's return and, on September 29, 1975, requested payment within 10 days. (R. 51a.) Secs. 6155 and 6201(a)(1) of the Code. Barring a determination of jeopardy by the District Director, the Internal Revenue Service could not levy on Ranger's property until the ten-day period had elapsed. Sec. 6331(a), Appendix, infra. But, after Jacobson represented that Ranger could not readily meet its substantial liability, a jeopardy determination was made under Section 6862(a), Appendix, infra. Since the second quarter's liability had already been assessed and a demand for payment had been made, this jeopardy determination merely permitted the Internal Revenue Service to levy on Ranger's property prior to the end of the ten-day period. Levies were then placed upon some of Ranger's properties and interests, but no actual collection was made from these levies. Although the plaintiffs assert that no demand for immediate payment was made pursuant to the jeopardy determination under Section

6862(a), this fact, even if true, would reflect nothing more than a possible technical defect in the levies themselves. It would in no way detract from the facts that the taxes, which were admittedly due, had been properly assessed and that payment of the delinquency was due by October 9. Ranger satisfied the second quarter delinquency from independent sources prior to October 9.

The plaintiffs do not contend that there are even technical defects in the jeopardy assessment made for the third quarter. Because the withholding tax return was not due until October 31, a jeopardy assessment under Section 6862(a) was required to permit collection of the delinquency. Appropriate notice was given to Ranger's authorities, and levies were again placed on its property interests. Again, Ranger met its liability through independent sources and, as with the

^{11/} In any event, if the plaintiffs had not paid the entire second quarter delinquency by October 9 (and they represented to the defendants that they could not (R. 32a)), the levies could have been placed at that time.

^{12/} Although the amount shown delinquent on Ranger's second quarter return was \$264,492.86 (R. 5la), the total payment for the second quarter included an additional \$12,906.49 which represents a penalty for failure to make timely withholding tax deposits. Sec. 6656(a). Such penalty can be assessed and collected as any other tax. Sec. 6659(a). Since this penalty was not shown on Ranger's second quarter return, it was assessed under Section 6862(a). The penalty was paid upon notice by the defendant Pallila (R. 35a), so the provisions of Section 6862(a) were complied with fully with respect to the penalty.

collection actions taken for the second quarter's delinquency, the levies were released. The jeopardy determinations in both cases need have been prompted only by the District Director's "belief" that collection of the taxes would be jeopardized by delay. Section 6862(a); Treasury Regulations on Procedure and Administration (1954 Code), § 301.6862-1, Appendix, infra. This is, of course, a discretionary function entrusted to the District Director, which permits him to protect the collection of the revenue, and the courts have hesitated to interfere with the exercise of this discretion. See Transport Manufacturing & Equipment Co. of Del. v. Trainor, 382 F. 2d 793 (C.A. 8, 1967); Lloyd v. Patterson, 242 F. 2d 742, 743-744 (C.A. 5, 1957). Certainly in the instant case, the substantial size of Ranger's withholding tax delinquencies for the second and third quarters, coupled with the deteriorating condition of its business, fully warranted the District Director's exercising his discretion to seek summary collection of the revenues at stake. Moreover, Ranger was not entitled by law to an extension of the time for payment of these taxes under Section 6161(a)(1) of the Code, Appendix, infra, and the Regulations thereunder, since such an extension is likewise subject to the discretion of the Revenue officials. Accordingly, it

^{13/} There is no statutory or regulatory requirement that the District Director communicate the grounds for his jeopardy determination to the taxpayer.

is patently obvious that the defendant's actions in this case, even assuming certain technical errors, are not completely without an independent basis in the revenue-collecting requirement of the Code under the teaching of Bob Jones University, and that the Anti-Injunction Act should bar the injunctive relief sought--unless a statutory or judicial exception to Section 7421(a) can be established.

The statutory exceptions to Section 7421(a), as here pertinent, are found in Sections 6212 and 6213 of the Code, Appendix, infra. But, as the District Court stated (R. 83a-84a), these sections prescribe the rules governing the mailing of notices of deficiency, which are specifically made applicable only to situations involving income (subtitle A) and estate and gift taxes (subtitle B), and which delimit the jurisdiction of the Tax Court. The taxes in question in the instant case, however, are withholding taxes which are imposed under subtitle C of the Code. The statutory exceptions of Section 7421(a) are therefore inapplicable to this case.

The plaintiffs apparently do not pursue in this appeal the District Court's dismissal of the complaint insofar as it seeks to enjoin the issuance of subpoenas for records of corporations in which Jacobson owns an interest. (R. 40a.) In any event, Section 7421(a) likewise serves to prohibit interference with the investigatory powers of the Internal Revenue Service under Sections 7601 and 7602 of the Code. See Black v. United States, supra, Slip. Op. 3388-3390 (allegations of harassment insufficient to permit injunction against continued Internal Revenue Service investigation).

The plaintiffs attempt to analogize (Br. 13-15) the Supreme Court's recent decision in Laing v. United States, 44 U.S. Law Week 4035 (Sup. Ct., Jan. 13, 1976), to the case at bar. The facts in Laing clearly demonstrate, however, that the Court was there dealing with the Section 6213(a) exception to Section 7421(a). The question presented in that case was whether the income taxes found owing, but not reported, pursuant to a jeopardy termination of a person's taxable year under Section 6851 constituted a deficiency within the meaning of Section 6211(a), Appendix, infra. 44 U.S. Law Week, p. 4039. In answering the question in the affirmative, the Court ruled that, where the Service has not sent a notice of deficiency pursuant to its jeopardy determination as is required by Section 6861(b), Appendix, infra, the Internal Revenue Service has not made an assessment "as * * * provided in section 6861" and, thus, the express terms of Section 6213(a) permit an injunction against such as assessment pending the issuance of the notice of deficiency. 44 U.S. Law Week, p. 4042, fn. 27. Reliance upon Laing does not advance the instant plaintiffs' case, however, since there

If a deficiency is found to exist, then the taxes must be assessed according to Section 6861(a) which permits a jeopardy assessment of taxes if the "Secretary * * * believes the * * * assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay * * * notwithstanding the provisions of section 6213(a) * * *." Section 6211 defines "deficiency" only with respect to income, estate and gift taxes.

is simply no statutory requirement that notices of deficiency be sent with respect to employment taxes. Moreover, in Laing, the failure to send the notice of deficiency triggered a statutory exception to Section 7421(a). Such is not the case here, even assuming that no "immediate notice and demand" for payment of the second quarter delinquency was made under Section 6862(a). As was shown, supra, this delinquency had already been assessed under Section 6201(a)(1) on the basis of Ranger's second quarter return prior to the initial demand for payment. Accordingly, failure to make an immediate demand for payment prior to the end of the 10-day period could reflect only on the technical completeness of the levies (Sec. 6331(a)), and not upon Ranger's undeniable obligation to remit the delinquent taxes withheld from its employees for the second quarter of 1975 by October 9, 1975, pursuant to the initial demand by the Internal Revenue Service. It is thus clear that the plaintiffs cannot invoke a statutory exception to Section 7421(a) and that the broad prohibition specified therein must be applied, absent a finding that they qualify under the judicial exception prescribed in Enochs v. Williams Packing Co., supra.

^{16/} As shown, supra, plaintiffs are unable to cite even a technical deficiency in the defendants' actions with respect to the collection of the third quarter's delinquency.

In an effort to insure prompt collection of the revenue, and thereby give meaning to the central purpose behind Section 7421(a), the Supreme Court has fashioned an extremely narrow exception to the Anti-Injunction Act. This exception, as enunciated in Williams Packing, provides that collection may be enjoined only where: (1) given the most liberal view of the law and the facts, under no circumstances can the Government ultimately prevail on its claims and (2) equity jurisdiction otherwise exists. Both parts of this twofold test must be met before injunctive relief can be granted. Bob Jones University v. Simon, supra, p. 737; Alexander v. "Americans United Inc., 416 U.S. 752, 758 (1974); Pizzarello v. United States, 408 F. 2d 579 582-583 (C.A. 2, 1969), cert. denied, 396 U.S. 986 (1969); Botta v. Scanlon, 314 F. 2d 392, 394 (C.A. 2, 1963). Since the plaintiffs do not contest the withholding tax liability which forms the basis for the assessments in this case, they wholly fail to satisfy the first portion of the Williams Packing test. Certainly, it cannot be said that the assessments made and collection efforts taken by the defendants were "plainly without a legal basis" (see Bob Jones University v. Simon, supra, p. 745), when there were substantial amounts of withholding taxes admittedly due and owing by a failing business without realistic prospects

for payment. See Westgate-California Corp. v. United States, 496 F. 2d 839 (C.A. 9, 1974). Having thus failed to establish the initial premise for invoking the Williams Packing exception, the plaintiffs cannot evade the grasp of the Anti-Injunction Act. But it is likewise apparent that they have not made a showing that equity jurisdiction would otherwise exist in this case.

As the Court recognized in <u>Williams Packing</u>, the manifest purpose of the Anti-Injunction Act is to permit the Government to collect taxes allegedly due without judicial intervention,

This Court has recognized in Pizzarello v. United States, supra, that the first Enochs test can be met if it is shown that the assessment is excessive, arbitrary and capricious. There, a jeopardy assessment of wagering excise taxes covering a five-year period was made based upon receipts covering three days of betting activity, without any indication that the taxpayer himself was actually engaged in the business of gambling. 400 F. 2d, pp. 583-584. See also Lucia v. United States, 474 F. 2d 565, 573-574 (C.A. 5, 1973). Conversely, similar assessments have been viewed as not arbitrary and excessive where a taxpayer has admitted liability for at least some of the tax. See Hamilton v. United States, 309 F. Supp. 468, 474 (S.D. N.Y., 1909), aff'd per curiam, 429 F. 2d 427 (C.A. 2, 1970), cert. denied, 401 U.S. 913 (1971); Carson v. United States, 506 F. 2d 745, 746 (C.A. 5, 1975) (jeopardy assessment). In the instant case, of course, the plaintiffs concede Ranger's liability for nearly the entire amount of the assessments made by the defendants.

and "to require that the legal right to the disputed sums be determined in a suit for refund." 370 U.S., p. 7. The adequacy of the legal remedy provided by the refund suit (Sec. 7422) to determine liability for the taxes here in issue is well established. Bob Jones University v. Simon, supra, pp. 746-748; Flora v. United States, 362 U.S. 145, 175, fn. 38 (1960); Trent v. United States, 442 F. 2d 405, 406 (C.A. 6, 1971). See also Black v. United States, supra, Slip Op. 3389; Hamilton v. United States, supra, p. 474. Since this remedy was available to the plaintiffs below, they cannot successfully claim that the defendants' actions subjected them to irreparable injury for which there was no adequate remedy at law so as to demonstrate the existence of equity jurisdiction. Moreover, any allegation of irreparable injury in the instant case stems exclusively from the collection of taxes which were admittedly overdue. While it is well recognized that collection of taxes lawfully due cannot be prevented by the hardship caused to a taxpayer (see Holdeen v. Raterree, 155 F. Supp. 509, 510-511 (N.D.N.Y., 1957), aff'd per curiam, 253 F. 2d 428 (C.A. 2, 1958)), this principle carries even more force where, as here, the assessment and collection actions taken by Internal Revenue Service officials cannot be said to be "plainly without a legal basis." Bob Jones University v. Simon, supra, pp. 742-746.

The Supreme Court has recently given further explication of the Williams Packing exception in Commissioner v. Shapiro 44 U.S. Law Week 4313 (Sup. Ct., March 8, 1976), aff'g sub nom. Shapiro v. Secretary of State, 499 F. 2d 527 (C.A. D.C., 1974). In Shapiro, the Commissioner made a jeopardy assessment of income taxes against a taxpayer who was facing imminent extradition to Israel. Levies were placed on the taxpayer's bank deposits and some \$35,000 was collected pursuant to these levies. The taxpayer sought injunctive relief, asserting that the money so seized would have been used for his bail in Israel and, barring, the availability of such funds, he would be incarcerated in Israel without an opportunity to challenge the Commissioner's assessment in the Tax Court. The assessment was based upon a projection of the taxpayer's income stemming from his alleged activities in selling narcotics. The court of appeals ruled that the second part of the Williams Packing test was met since the taxpayer would, barring an injunction, be denied the opportunity to utilize the legal remedy otherwise available to determine the basis for the assessment. The court

^{18/} The court was there concerned only with the Tax Court remedy since the assessment against Shapiro was for a deficiency in income taxes and, under the circumstances there present, he clearly would not have been able to meet the full-payment rule of Flora v. United States, supra, allowing him to sue for refund in the District Court.

then ruled that the Commissioner would have to accede to Shapiro's request for discovery or otherwise show a basis for the assessment, thereby demonstrating that Shapiro had failed to satisfy the first portion of the Williams Packing exception. 499 F. 2d, pp. 532-535. The Supreme Court affirmed the court of appeals' decision, emphasizing that the Government need only make an initial showing concerning the assessment where the taxpayer can prove that his legal remedies are wholly inadequate to repair the injury caused by "an erroneous assessment or collection of an asserted tax liability." And even then, the Court stated that the Commissioner need only show that his "assessment has a basis in fact." 44 U.S. Law Week, p. 4313.

The distinctions between Shapiro and the instant case are readily apparent. First, there is absolutely no question in the case at bar that the assessments made against Ranger had a "basis in fact." Indeed, as has been shown, the assessments were of taxes admittedly due, the amounts were largely uncontested and the Government's prospects for collection were uncertain at best. Second, the plaintiffs, unlike Shapiro,

^{19/} In Shapiro the Court was concerned with permitting the "Government to seize and hold property on the mere good-faith allegation of an unpaid tax * * * where it is asserted that seizure of assets pursuant to a jeopardy assessment is causing irreparable injury." 44 U.S. Law Week, p. 4318. Where, as here, there is no question as to the tax liability itself, it would appear that Shapiro is of doubtful applicability at best. In addition, the assets "seized" by the Government in the instant case have already been released upon payment of the liabilities sought by the plaintiffs would effectively require this Court to order the return of tax dollars properly paid in order to

have the full opportunity to litigate Ranger's tax liability through the prescribed legal remedy, a suit for refund. The plaintiffs thus fall outside the perimeters of the <u>Williams</u> Packing exception as further defined in <u>Shapiro</u>. See <u>Black</u> v. United States, supra, Slip. Op. 3390.

In this appeal, the plaintiffs challenge for the first time the constitutionality of Section 6862, the jeopardy 20/assessment provision, and the Regulations thereunder. (Br. 19-22.) This attempt to raise their claim to a Constitutional level aids the plaintiffs little in the instant case, however, since the Supreme Court has recognized that "the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act."

Alexander v. "Americans United"
Inc., supra, p. 759. See also United States v. Americans
Friends Service Com., 419 U.S. 7, 11 (1974). Thus, where a

permit installment payment of those same liabilities with no realistic assurance to the Government that Ranger, now out of business, could even make the payments. (Order to Show Cause on Pltf.'s Motion under Rule 4(a) F.R.A.P., Affidavit of Counsel, par. 6.) An injunction under these circumstances would be clearly barred by any reasonable construction of the Anti-Injunction Act.

^{19/ (}continued):

^{20/} In making their argument on the Constitutional question, the plaintiffs state (Br. 20) that a jeopardy assessment is improper unless the District Director under Regulations § 301.6862-1(a), actually forms a "belief" that collection of the tax was jeopardized. The plaintiffs cite White v. Cardozo, 368 F. Supp. 1397 (E.D. Mich., 1973), where the District Court ruled that the first portion of the Williams Packing exception can be met where the assessment and levies are procedurally defective and where the assessment is without a foundation in

Constitutional claim is (at best) debatable, it fails to meet the first <u>Williams Packing</u> requirement that "under no circumstances" may the Government establish its claim.

See <u>Bob Jones University</u> v. <u>Simons</u>, <u>supra</u>, pp. 748-749.

20/ (continued):

fact. Whatever the merits of White, it can be distinguished on the basis that the size of the assessments in question here are not challenged, and that, although there may have been technical defects in the levies imposed for the second grarter's delinquency (accordingly to plaintiffs' allegations), no property was seized pursuant to those levies, and payment in full of that delinquency was unquestionably due by October 9, 1975. The plaintiffs' renewed reliance on Laing v. United States, subra, (Br. 21) is also misplaced, since injunctive relief was permitted there as a result of the applicability of a statutory exception to the Anti-Injunction Act. The Court there expressly declined to deal with the procedural due process question (see fn. 22, infra). 44 U.S. Law Week, p. 4042, fn. 26.

21/ In Bob Jones University, supra, pp. 740-741, the Court recognized that it had previously refused to grant injunctive relief against the collection of the Child Labor Tax, although the tax was challenged on Constitutional grounds, while on the same day the Court, in a refund suit, struck down that tax as unconstitutional. Bailey v. George, 259 U.S. 16 (1922); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922). See also Lewis v. Sandler, supra, p. 398.

We submit that the plaintiffs' contention that Section 6862(a) is unconstitutionally vague, because it requires only a "belief" that collection is jeopardized, is hardly a strong enough legal argument to permit the application of the Williams Packing exception to the case at bar.

The vagueness doctrine, which is usually applied to criminal statutes, but which can also be applied to civil statutes, generally requires that statutory language contain a sufficient warning as to the proscribed conduct, as measured by common understanding and practices, which triggers the statute's sanction. See <u>Jordan v. De George</u>, 341 U.S. 223, 231 (1951); <u>United States v. Schwartz</u>, 464 F. 2d 499, 506-507 (C.A. 2, 1932), cert. denied, 409 U.S. 1009 (1972). The doctrine further comprehends the likelihood that the statutory language must deal with a myriad of factual situations, so no more certainty than is reasonable and consistent with the purpose

The plaintiffs do not challenge Section 6862(a) on the grounds that it is violative of procedural due process because of its failure to provide a post-collection inquiry into the basis for the Commissioner's assessment. See Commissioner v. Shapiro, supra, pp. 4318-4319; Laing v. United States, supra, p. 4043 (concurring opinion of Justice Brennan). In Shapiro, the Court stated that the long-standing Constitutional justification for surmary tax collection procedures found in Phillips v. Commissioner, 283 U.S. 588, 595-596, fn. 6 (1931), is tied to those cases where a taxpayer has an adequate opportunity for a later judicial determination of his tax liability. 44 U.S. Law Week, p. 4319. In Shapiro, there was no such opportunity, whereas in the present case there clearly is. Moreover, the Constitutional concern is with seizure of assets where there may be no basis for the underlying assessment. In the instant case, such a possibility was precluded, since the tax liability was admitted and the payment overdue.

behind the statute can be expected. Arnett v. Kennedy, 416 U.S. 134, 158-164 (1974); Boyce Motor Lines, Inc. v. States, 342 U.S. 337, 340 (1952); Brennan v. Occupational Safety & Health Rev. Com'n., 505 F. 2d 869, 872 (C.A. 10, 1974). In this sense, the vagueness doctrine can be likened to the delegation of powers problem incumbent upon the grant of broad discretion to an executive agency by a legislative enactment. Such delegations are proper where the Congress delineates the general policy, the agency which is to apply it, and the boundaries of the delegated authority. See American Power Co. v. S.E.C., 329 U.S. 90, 105 (1946); Yakus v. United States, 321 U.S. 414, 424-425, 442 (1944) (citing summary tax collection as a properly delegated authority); Ginsburg v. United States, 278 F. 2d 470, 472-473 (C.A. 1, 1960), cert. denied, 364 U.S. 878 (1960).

Section 6301 provides the broad power for the "Secretary or his delegate" to collect taxes. Section 6862(a) permits a departure from the normal collection procedures where the Secretary or his delegate "believes" that the collection of the

^{23/} Both Boyce Motor Lines and Brennan indicate that regulatory language is judged by the same standard as statutory language. The cases cited by the plaintiffs (Br. 20) in support of their contention that Section 6862(a) is unconstitutionally vague are merely descriptive of the principles of that doctrine as applied to criminal statutes. It should be noted that United States v. Powell, 501 F. 2d 1136 (C.A. 9, 1974) (ruling that 18 U.S.C., Section 1715 was unconstitutionally vague), has recently been reversed by the Supreme Court, 44 U.S. Law Week 4010 (Sup. Ct., Dec. 2, 1975).

tax will be jeopardized by delay. The importance and appropriateness of the summary collection procedures to the Government's need to protect the collection of the revenue is well established. See Phillips v. Commissioner, supra; Mitchell v. W. T. Grant Co., 416 U.S. 600, 611 (1974); Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972). It would be virtually impossible for Congress to delineate the exact circumstances which should properly give rise to the need for a jeopardy assessment and, accordingly, this authority was delegated to the discretion of those officials who are most closely involved with the revenue collecting process. The statutory scheme likewise includes an avenue to contest, both administratively and judicially, the tax liability upon which the summary collection was based. Secs. 6532(a) and 7422(a). In addition, it is clearly not beyond a businessman's common understanding and practice that the Internal Revenue Service may seek summary collection of a withholding tax delinquency in excess of \$500,000 where the employer's officers have directed the payment of other creditors from the funds held in trust for the United States (Sec. 7501), and where the officer has represented, after an initial demand for payment of delinquency, that the business is failing and that ready payment cannot be made. (R. 31a-32a.) Thus, given the evident purpose behind the jeopardy assessment provision and the compelling need for summary procedures to collect the revenue, Section 6862(a) clearly passes muster under the vagueness doctrine.

The plaintiffs' attempt to limit the situations in which a District Director may make a jeopardy determination under Section 6862 by applying the language of Section 6851, is entirely without merit. (Br. 21-22.) Section 7806(b) of the Code expressly provides that no legal effect can be given to the location or grouping of sections in the Code. Moreover, the language in Section 6851 which permits the Secretary or his delegate to terminate a taxable year where he finds that a taxpayer designs to do "any other act tending to prejudice or render wholly or partially ineffectual proceedings to collect the income tax" is at least as broad as the language of Section 6862(a) which can be invoked where there is a "belief" that collection will be jeopardized.

More importantly, however, the legislative history to Section 6862(a) conclusively demonstrates that Congress did not intend that jeopardy determinations under Section 6862(a) be confined to the instances cited in Section 6851(a). The statutory predecessor to Section 6862(a) is § 1105 of the Revenue Act of 1932, c. 209, 47 Stat. 169. The statute was enacted to provide for the prompt collection of taxes other than income taxes, for which jeopardy assessments were already

provided under the existing law. See S. Rep. No. 665. 72d Cong., 1st Sess., pp. 58-59 (1939-1 Cum. Bull. (Part 2) 496. 538). As promulgated, Section 1105 read identically in all pertinent parts to the present Section 6851(a). Two years later, however, the Congress amended Section 1105 of the 1932 Act to read largely in its present form, thereby specifically adopting the "believe that the collection would jeopardized by delay" formulation, as opposed to the "finding" language of the present Section 6851(a). Section 510 of the Revenue Act of 1934, c. 277, 48 Stat. 680. The change was made because the jeopardy assessment provision as originally enacted "proved so cumbersome in operation that it * * * [was] ineffective for its purpose, the prompt assertion of taxes in cases where delay would endanger collection." H. Rep. No. 704, 73d Cong., 2d Sess., pp. 39-40 (1939-1 Cum. Bull. (part 2) 554, 584); S. Rep. No. 558, 73d Cong., 2d Sess., p.50 (1939-1 Cum. Bull. (Part 2) 586, 624). The foregoing makes it abundantly clear that Section 6862(a), on its face, suffers no Constitutional infirmity so great as to permit a finding that under no circumstances could the Government prevail if called upon to establish its Constitutionality.

The power to make jeonardy assessments relating to income taxes, where the Commissioner "believed" that collection would be jeopardized by delay, was originally enacted as the final proviso to Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227. This was the forerunner of the present Section 6861(a).

B. Insofar as the complaint seeks damages from the Internal Revenue Service, the action is barred by sovereign immunity

After entering its memorandum and order ruling that the plaintiffs' request for injunctive relief was barred by the Anti-Injunction Act, the District Court directed that judgment be entered in favor of the defendants and that the entire complaint be dismissed as to them. (R. 94a.) In effect, the court below dismissed the plaintiffs' causes of action for damages against the instant defendants sua sponte. The plaintiffs did not seek relief from this judgment in the District Court under Rules 59(e) or 60(b) of the Federal Rules of Civil Procedure and, further, permitted their appeal time to expire before petitioning the District Court to accept their notice of appeal out of time under Rule 4(a) of the Federal Rules of Appellate Procedure. In this appeal, the plaintiffs now contend that the District Court acted improperly in dismissing the entire complaint, effectively arguing that they stated several causes of action for damages against the defendants. (Br. 16-18, 23-25.) Insofar as they seek damages against the Internal Revenue Service, however, the plaintiffs' causes of action are unquestionably barred on jurisdictional grounds.

^{25/} In discussing a District Court judge's inherent power to dismiss a case <u>sua sponte</u> for failure to prosecute, the Supreme Court has stated that all of the circumstances must be considered in determining whether the lower court has abused its discretion. Further, the Court recognized the corrective remedy of Rule 60(b) as providing an "escape hatch" to mitigate any unfairness stemming from the dismissal.

Link v. Wabash Railroad Co., 370 U.C. 626, 629-633 (1962).

Rule 12(h)(3) of the Federal Rules of Civil Procedure provides that "whenever it appears * * * that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." See Bernstein v. Universal Pictures, Inc., 517 F. 2d 976, 979 (C.A. 2, 1975). Jurisdiction over any cause of action against the Internal Revenue Service is precluded by the fact that, absent a specific statutory authorization, executive agencies of the Federal Government are not suable entities. See Blackmar v. Guerre, 342 U.S. 512, 516 (1952) (Civil Service Commission); Economou v. United States Dept. of Agriculture, F. 2d ___ (C.A. 2--No. 75-6050), Slip. Op. 3397-3398. This is founded on the principle that, although nominally lodged against the Internal Revenue Service, the action is in reality against the United States and is therefore barred by the doctrine of sovereign immunity. Dugan v. Rank, 372 U.S. 609, 620 (1963); Louisiana v. McAdoo, 234 U.S. 627 (1914). Executive agencies are thus subject to suit only where the United States specifically consents to suit, and the terms of its consent define the court's jurisdiction. United States v. Sherwood, 312 U.S. 584, 586-587 (1941); Brown v. General Services Administration, 507 F. 2d 1300, 1307 (C.A. 2, 1974). The plaintiffs have failed to cite a statute waiving the im unity of the United States from suit in cases such as this, and,

it is submitted, no such statutes exist. To be sure, statutory actions for civil rights violations, such as under 42 U.S.C., Section 1985, do not constitute waivers of sovereign immunity. See Smallwood v. United States, 358 F. Supp. 398, 405 (E.D. Mo., 1973), aff'd, 486 F. 2d 1407 (C.A. 8, 1973). Moreover, to the extent that Bivens v. Six Unknown Fed.

Narcotics Agents, 403 U.S. 388 (1971), creates a cause of action for damages against federal officers, such actions are properly asserted only against the individual officers, and only for violations of Constitutional rights. Accordingly, the plaintiffs' action for damages against the Internal Revenue Service is barred by the doctrine of sovereign immunity.

^{26/} Although the plaintiffs' seventh cause of action (R. 15a-16a) sounds in tort, the plaintiffs' cannot invoke the Federal Tort Claims Act (28 U.S.C., Sec. 1346(b)) as a waiver of sovereign immunity, since actions arising "in respect of the assessment or collection of any tax" are specifically excepted from that Act. 28 U.S.C., Section 2680(c). In any event, the plaintiffs have failed to satisfy the jurisdictional prerequisite for qualification under the Act, since no presentation of an administrative claim was made to the Internal Revenue Service. 28 U.S.C., Sec. 2675; Altman v. Connally, 456 F. 2d 1114 (C.A. 2, 1972).

C. The plaintiffs failed to state a cause of action for damages against the individual defendants

It is readily apparent that the plaintiffs' complaint failed to state a cause of action against the individual defendants, and was therefore properly dismissed. The plaintiffs' arguments on appeal are centered largely on demonstrating the sufficiency of their complaint, but the grounds for relief alleged in the pleadings (as supplemented by plaintiff Jacobson's affidavit) are totally without merit.

The sixth cause of action in the complaint (R. 14a-15a) seeks monetary relief on behalf of Jacobson for damages suffered as a result of the defendants' conspiracy to violate his civil rights under 42 U.S.C., Section 1985(3), Appendix,

^{27/} Sua sponte dismissals without notice have been subject to strict scrutiny by appellate courts on due process grounds. See, e.g., California Diversified Promotions. Inc. v. Musick, 505 F. 2d 278 (C.A. 9, 1974). The plaintiffs do not directly challenge the District Court's disposition on this basis, however, and it is submitted that, under the circumstances here, where plaintiffs' counsel was permitted to elaborate on their claim in the course of the hearing on the preliminary injunction, any potential due process deficiencies in the court's action have been largely mitigated, if not entirely eliminated. In addition, the plaintiffs sought no relief from judgment in the court below, and couch their arguments in this Court largely on the ground that they stated several causes of action against the defendants. Procedurally, then, this case is similar to Robins v. Rarback, 325 F. 2d 929 (C.A. 2, 1963), cert. denied, 379 U.S. 974 (1905), where this Court reached the merits of a complaint which had been dismissed by the trial court, without motion by the defendant, after the lower court denied the plaintiff's motion for a preliminary injunction.

^{28/} Plaintiff Jacobson does not appeal the dismissal of his cause of action under 42 U.S.C., Section 1981. (Br. 3.)

infra. In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court ruled that the above statute could be invoked against "private" conspiracies, as well as those involving "state action." The Court warned, however, that its decision should not be interpreted as creating a general federal tort law under the statute, and hastened to note that the statute was not intended to apply to all tortious interferences with the rights of others. Such an extension would be prevented by requiring, as an element of the action, "the kind of invidiously discriminatory motivation" stressed by the framers of the statute. Thus the Court stated that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." 403 U.S., pp. 101-102. The gist of Jacobson's complaint is that the defendants engaged in a personal vendetta against him and, in that regard, wholly fails to support a claim that any alleged discrimination exercised against him was class-based. See Waits v. McGowan, 516 F. 2d 203, 208-209 (C.A. 3, 1975); Arnold v. Tiffany, 487 F. 2d 216, 218 (C.A. 9, 1973), cert. denied, 415 U.S. 984 (1974); Bricker v. Crane, 468 F. 2d 1228, 1232-1233 (C.A. 1, 1972), cert. denied, 410 U.S. 930 (1973).

In their seventh cause of action (R. 15a-16a) the plaintiffs allege that the defendants conspired to invade the plaintiffs' "rights, reputation, property and business." Such assertions, when coupled with the general allegations of harassment, amount to claims which sound in tort (slander,

inference with contract rights) and the plaintiffs so recognize. (Br. 16.) The plaintiffs also refer to Bivens v. Six Unknown Fed. Narcotics Agents, supra, as establishing a cause of action for damages against federal law enforcement officials for alleged violations of a person's Fourth Amendment rights. Indeed, the traditional absolute immunity from suit that federal executive officials once enjoyed has been cut back by this Court (among others) to a qualified "good faith" immunity based on Scheuer v. Rhodes, 416 U.S. 232 (1974). See Economou v. United States Department of Agriculture, supra. The doctrine of absolute immunity as applied to federal officials performing discretionary functions within the scope of their authority was established in Barr v. Mateo, 360 U.S. 564 (1959), a case involving a tort action for libel. But Scheuer dealt with an action against state officials for alleged violations of civil rights (42 U.S.C., Section 1983) and thus the cause of action there was of a Constitutional character. In addition, the courts of appeal which have applied the Scheuer rationale to actions against federal officials have done so exclusively in cases where there have been alleged violations of Constitutional rights. Also, the Supreme Court has recently reaffirmed the warning stated in

^{29/} See, e.g., Apton v. Wilson, 506 F. 2d 83 (C.A. D.C., 1974) (action against the Attorney General and subordinates for alleged violations of Fourth and Fifth Amendment rights);

Mark v. Groff, 521 F. 2d 1376 (C.A. 9, 1975) (alleged violations by Internal Revenue Service agents of Fifth, Sixth and Eighth Amendment rights).

Griffin v. Breckenridge, supra, that not every allegation of harm which would qualify as a tort under state law can be characterized as a violation of Constitutional rights. Paul v. Davis, 44 U.S. Law Week 4337, 4338-4339 (Sup. Ct., Mar. 23, 1976). Since the Supreme Court quoted the Barr decision with approval throughout its oplaion in Scheuer, without intimating that it was thereby limiting or restricting Barr, the only reasonable conclusion to be drawn from Scheuer and subsequent case law is that insofar as a plaintiff alleges tortious, but not unconstitutional, conduct on the part of a federal official performed within the scope of his authority, that official remains absolutely immune from suit in his personal capacity. There is little doubt in the instant case that the defendants' activities in seeking collection of Ranger's delinquent withholding tax liability were well within the "outer perimeter" (Barr v. Mateo, supra, p. 575) of their line of duty so their absolute immunity from any suit sounding in tort should attach, absent a properly asserted claim of a Constitutional dimension

^{30/} Of course, there remain common law exceptions to the rule of absolute immunity. See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bur of Narc., 456 F. 2d 1339, 1346-1347 (C.A. 2, 1972). But cf. Imbler v. Pachtman, 44 U.S. Law Week 4250 (Sup. Ct., Mar. 2, 1976) (absolute immunity for prosecutors for actions under 42 U.S.C., Section 1983).

^{31/} Officials of the Internal Revenue Service have long been accorded absolute immunity from tort suits stemming from their collection activities. See David v. Cohen, 407 F. 2d 1268 (C.A. D.C., 1969); Bershad v. Wood, 290 F. 2d 714 (C.A. 9, 1961); Berberian v. Gibney, 75-1 U.S.T.C., par. 9452 (C.A. 1, 1975); Kotmair v. Gray, 505 F. 2d 744 (C.A. 4, 1974).

which can otherwise overcome their good-faith immunity. It is submitted that no such claim is made by the plaintiffs in this case.

The plaintiffs assert (Br. 16) that the District Court's dismissal of the complaint precluded them from amending their fourth cause of action to include a prayer for damages based on alleged violations of their Constitutional rights. As stated, the fourth cause of action (R. 13a-14a) refers generally to violations of their Fifth Amendment rights, but seeks only injunctive relief, which is barred by the Anti-Injunction Act. The dismissal did not, however, prevent the plaintiffs from petitioning the court below to amend its judgment and permit the filing of an amended complaint. In any event, the mere addition of a prayer for damages to that cause of action would not cure the overall defect in the plaintiffs' complaint, which is that the acts alleged to have been undertaken by the instant defendants simply do not amount to violations of the plaintiffs' Fifth Amendment rights. The type of conclusory allegations made by the plaintiffs (such as "harassment") standing alone are insufficient, of course, to state a claim for deprivation of Constitutional rights. See Black v. United States, supra;

^{32/} While Bivens and its progeny authorize damage actions against federal officials for violations of Constitutional rights, it is fundamental that persons seeking to hold such officials personally liable must plead actions undertaken by such officers that constitute a violation of those rights or risk dismissal of their complaint. See Wheeldin v. Wheeler, 373 U.S. 647 (1963).

Albany Welfare Rights Org. Day Care Ctr., Inc. v. Schreck, 463 F. 2d 620 (C.A. 2, 1972), cert. denied, 410 U.S. 944 (1973).

In the instant case, the plaintiffs essentially claim that the assessment and collection of Ranger's withholding tax delinquencies for the second and third quarters of 1975, and the defendants' refusal to permit payment of these obligations in installments would violate their rights to Due Process. They further assert on appeal (Br. 24) that the manner in which the taxes were assessed demonstrates that the plaintiffs were given "special" treatment because Ranger's predecessor corporation, Silvercup, amassed a large unpaid withholding tax liability and the Internal Revenue Service did not seek collection of those taxes through jeopardy assessments. Nowhere, however, do the plaintiffs refute the facts that these taxes were due and owing the Government, that Ranger was delinquent in paying over these taxes by amounts in excess of one-half million dollars, that Ranger's business was failing at the time of the assessments, and that, although payment was ultimately made, such payment came not from Ranger's assets but from independent sources.

It has been shown in Part A, supra, that the statutory requirements of the Code were satisfied in the assessment

^{33/} The District Director's possible knowledge of Silvercup's unsatisfied liability is significant, if at all, only in that it would provide even greater reason to seek prompt collection of Ranger's taxes.

and collection of these taxes, save possible procedural defects in the levies for the second quarter's assessment, but no property was seized pursuant to these levies. Such technical deficiencies do not take on Constitutional dimensions, however, and, in any event, would not, if proved, suffice to show bad faith on the part of the defendants. See, e.g., Economou v. Department of Agriculture, supra, Slip. Op. 3410, fn. 9. Contrary to the plaintiffs' assertions (Br. 23), the circumstances presented in the pleadings further demonstrate that there was more than adequate cause for the District Director to exercise his discretion to make jeopardy determinations under Section 6862(a) to insure the collection of Ranger's substantial withholding tax delinquency. The plaintiffs suffered no vio? tion of their Fifth Amendment rights by the jeopardy collection of taxes admittedly due, notwithstanding the fact that Revenue officials may choose another course of action under other undefined circumstances. See Christian Echoes National Ministry, Inc. v. United States, 470 F. 2d 849 857 (C.A. 10, 1972), cert. denied, 414 U.S. 864 (1973). In this context the plaintiffs' conclusory allegations that the Internal Revenue Service "took orders" (Br. 20) from the Strike Force fall almost of their own weight. Ranger's obligation to pay over the taxes withheld from its employees arose independently of any criminal investigation by the Strike Force. Ranger's failure to make such payments in vast amounts invited the collection actions taken in the instant case solely to protect the revenue.

This Court has recognized that the courts have been careful to couple the expansion in the liability of executive officers under the rule of qualified immunity with new and necessary safeguards in order to limit vexatious litigation and to minimize interference with the orderly workings of the Government. Black v. United States, supra. Certainly officials of the Internal Revenue Service, whose collection duties involve frequent contact with the public in an adversary role, are constantly subject to the threat of retaliation by vexatious lawsuits. See David v. Cohen, supra. Accordingly, even assuming that Revenue officials have only a good-faith immunity, claims such as that here presented, which contain general allegations of harassment by such officials but which are based solely on their lawful collection activities, should be subject to dismissal.

CONCLUSION

For the reasons stated above, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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APPENDIX

42 U.S.C.

- § 1985. Conspiracy to interfere with civil rights--Preventing officer from performing duties
- (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * *.

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 3102. DEDUCTION OF TAX FROM WAGES.

- (a) Requirement.—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid * * *

 * *
 Sec. 3402. INCOME TAX COLLECTED AT SOURCE.
- (a) Requirement of Withholding. -- Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables.

SEC. 6155. PAYMENT ON NOTICE AND DEMAND.

(a) General Rule--Upon receipt of notice and demand from the Secretary or his delegate, there shall be paid at the place and time stated in such notice the amount of any tax (including any interest, additional amounts, additions to tax, and assessable penalties) stated in such notice and demand.

SEC. 6161. EXTENSION OF TIME FOR PAYING TAX.

(a) Amount Determined by Taxpayer on Return .--

(1) General rule—The Secretary or his delegate, except as other provided in this title, may extend the time for payment of the amount of tax shown, or required to be shown, on any return or declaration required under authority of this title (or any installment thereof), for a reasonable period not to exceed 6 months (12 months in the case of estate tax) from the date fixed for payment thereof. Such extension may exceed 6 months in the case of a taxpayer who is abroad.

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) In General. -- For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 42 and 43, the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 42 or 43, exceeds the excess of--

(1) the sum of

- (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus
- (B) the amounts previously assessed (or collected without assessment) as a deficiency, over--
- (2) the amount of rebates, as defined in subsection
 (b) (2), made.

SEC. 6212. NOTICE OF DEFICIENCY.

(a) In General. -- If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 or 43, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) Time for Filing Petition and Restriction on Assessment. -- Within 90 days * * * after the notice of deficiency authorized in section 6212 is mailed * * * the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 or 43 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day * * * period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

SEC. 6331. LEVY AND DISTRAINT.

(a) Authority of Secretary or Delegate. -- If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * * If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10day period provided in this section.

SEC. 6851. TERMINATION OF TAXABLE YEAR.

(a) Income Tax in Jeopardy. --

(1) In general. -- If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom,

or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. * * *

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, GIFT, AND CERTAIN EXCISE TAXES.

- (a) Authority for Making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.
- (b) Deficiency Letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

SEC. 6862. JEOPARDY ASSESSMENT OF TAXES OTHER THAN INCOME, ESTATE, AND GIFT, AND CERTAIN EXCISE TAXES.

(a) Immediate Assessment.—If the Secretary or his delegate believes that the collection of any tax (other than income tax, estate tax, gift tax and certain excise taxes) under any provision of the internal revenue laws will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest, additional amounts, and additions to the tax provided for by law). Such tax, additions to the tax, and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Secretary or his delegate for the payment thereof.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT

(a) Tax.--Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) General Rule. Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.):

- § 31.6011(a)-4. Returns of income tax withheld from wages.
- (a) In general. * * * Except as otherwise provided in subparagraph (3) of this paragraph and in \$ 31.6011(a)-5, every person not required to make a return for the calendar quarter ended December 31, 1954, shall make a return of income tax withheld from wages pursuant to section 3402 for the first calendar quarter thereafter in which he is required to deduct and withhold such tax and for each subsequent calendar quarter (whether or not wages are paid therein) until he has filed a final return in accordance with \$ 31.6011(a)-6. Except as otherwise provided in \$ 31.6011(a)-8 and in subparagraphs (2) and (3) of this paragraph, Form 941 is the form prescribed for making the return required under this paragraph.

§ 31.6071(a)-1. Time for filing returns and other documents.

- (a) Federal Insurance Contributions Act and income tax withheld from wages--(1) Quarterly or annual returns. Except as provided in subparagraph (4) of this paragraph, each return required to be made under § 31.60ll(a)-1, in respect of the taxes imposed by the Federal Insurance Contributions Act, or required to be made under § 31.60ll (a)-4, in respect of income tax withheld, shall be filed on or before the last day of the first calendar month following the period for which it is made. However, any such return may be filed on or before the 10th day of the second calendar month following such period if timely deposits under section 6302(c) of the Code and the regulations have been made in full payment of such taxes due for the period. * * *
- § 31.6302(c)-1. Use of Government depositaries in connection with taxes under Federal Insurance Contributions Act and income tax withheld.
- (a) Requirement--(1) In general. (i) In the case of a calendar month which begins after January 31, 1971--
- (b) If at the close of any quarter-monthly period the aggregate amount of undeposited taxes is \$2,000 or more, the employer shall deposit the undeposited taxes in a Federal Reserve bank or authorized commercial bank within 3 banking days after the close of such quarter-monthly period. For purposes of determining the amount of undeposited taxes at the close of a quarter-monthly period, undeposited taxes with respect to wages paid during a prior quarter-monthly period shall not be taken into account if the employer has made a deposit with respect to such prior quarter-monthly period. An employer will be considered to have complied with the requirements of this subdivision (i) (b) for a deposit with respect to the close of a quarter-monthly period if--
 - (1) His deposit is not less than 90 percent of the aggregate amount of the taxes with respect to wages paid during the period for which the deposits is made, and

(2) If such quarter-monthly period occurs in a month other than the last month of a return period, he deposits any underpayment with his first deposit which is otherwise required by this subdivision (i) to be made after the 15th day of the following month.

* * *

Treasury Regulations on Procedure and Administration (1965 Code) (26 C.F.R.):

- § 301.6862-1. Jeopardy assessment of taxes other than income, estate, and gift taxes.
- (a) If the district director believes that the collection of any tax (other than income, estate, or gift tax) will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for filing the return or paying such tax has expired, immediately assess such tax, together with all interest, additional amounts and additions to the tax provided by law. * * *

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DOJ-1976-06